Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1979

No. 80-46

DOMINICK PILOTTI,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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In The

Supreme Court of the United States

October Term, 1979

No.

DOMINICK PILOTTI,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

STATEMENT

Petitioner Dominick Pilotti respectfully prays that this Court will grant a writ of certiorari to review the order of the New York Supreme Court, Appellate Division, First Department, rendered the 20th day of December 1980, affirming a judgment of the Supreme Court of the State of New York, County of Bronx, rendered the 3rd day of April 1978, convicting petitioner, upon his plea of guilty, of one count of criminal possession of a weapon in the third degree, and sentencing him to a term of 2½ to 5 years incarceration, which term Pilotti is presently serving.

Prior to the interposition of the plea of guilty, the petitioner had unsucessfully moved to suppress the weapon as evidence in his trial, but following a hearing that motion was denied. Under the law of New York, petitioner is permitted to appeal from the denial of the suppression motion despite the fact that he later interposed a plea of guilty.

OPINION BELOW

The Appellate Division of the New York Supreme Court rendered no opinion in affirming the judgment of conviction. The opinion of the trial judge is annexed to this petition as an appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). An associate judge of the New York Court of Appeals denied leave to appeal from the order of the New York Supreme Court, Appellate Division, First Department, affirming the judgment of conviction, on the 17th day of June 1980. The Appellate Division order was rendered the 20th day of December 1980.

QUESTIONS PRESENTED

1. Whether petitioner's rights under the Fourth and Fourteenth Amendments of the United States Constitution were violated when police officers, acting without probable cause, forceably halted a cab in which petitioner was riding as a passenger, and compelled petitioner to submit to a warrantless search, as a result of which a pistol was found in the pocket of an overcoat alongside of petitioner (*Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248; *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889)?

2. Whether an unlawful arrest and unreasonable search and seizure can be justified retrospectively by what is produced as a

result of the unconstitutional and illegal actions of the police (*Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407; *Johnson v. United States,* 333 U.S. 10, 68 S. Ct. 367; *Dunaway v. New York, supra*)?

3. Since petitioner was never arrested for any crime other than possession of a weapon, whether the police officers, allegedly responding to a radio call about a "possible shooting" by four "Hispanics" were justified in forceably stopping a taxi in which petitioner, an "Italian" was riding as a passenger almost an hour later, and compelling him to submit to a warrantless search which resulted in the seizure of the weapon from a coat resting inside the cab?

4. Whether the police acted with probable cause in effectuating petitioner's arrest and making the search?

5. Since no intervening independent act by the petitioner or a third party occurred which broke the causal chain linking the illegality and the evidence in such a way that the evidence was not in fact obtained by "exploitation of that illegality", whether the taint of the initial illegality was removed so as to admit the evidence (*People v. Sesslin,* 68 Cal. 2d 418; *People v. Teresinski,* Cal. Sup. Ct., 2/11/80, 26 Cr. L. 2531)?

6. Whether the Fourth Amendment of the United States Constitution protects people and not simply "areas" against unreasonable searches and seizures (*Katz v. United States,* 389 U.S. 347, 353, *Rakas v. Illinois,* 439 U.S. 128)?

7. Whether the police activities in using their police vehicle to block a taxi in which petitioner was a passenger, and then approaching the cab with guns drawn and compelling petitioner to leave the taxi and submit to a search, were nevertheless justified under a so-called "balancing test" for sub-arrest police activities as allegedly applied in the State of New York (*Dunaway v. New York, supra*)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 6 of the New York State Constitution, and Section 140.50 of the Criminal Procedure Law of the State of New York are involved herein.

THE FACTUAL BACKGROUND

The indictment charged the petitioner solely with the crime of criminal possession of a weapon in the third degree. It did not charge him with any shooting or any other crime.

The petitioner pleaded guilty following a suppression hearing. The factual background, therefore, will necessarily depend upon the circumstances involved in the suppression hearing upon which this petition for a writ of certiorari is predicated. It is the position of the petitioner that the suppression hearing presents more than sufficient facts warranting a determination that at least the Fourth, Fifth, and Sixth Amendments were violated when an unreasonable search and seizure was perpetrated by police officers who forceably stopped a taxi in which petitioner sat, conducted a search, and seized a pistol which was in a coat resting on the seat of the cab.

THE SUPPRESSION HEARING CONSIDERED

We view the facts as found by the judge conducting the suppression hearing, most favorable to the prosecution. Using that standard, we maintain that the activities herein do not pass constitutional muster and the rights of the petitioner under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution were violated.

The prosecution produced Police Officers Douglas Pace and Frank Longo, a detective and police officer respectively,

who were on routine patrol duty on the 9th of April 1977 at about 9:00 A.M. in Bronx County.

They testified that they received information over the police radio concerning a possible shooting at Boston Road and Mace Avenue in the County of Bronx. The radio report identified the shooters as "four male *Hispanics*", who supposedly fled the scene in a green Pontiac station wagon bearing license plate number NY 232-XDP (Pace: 23; Longo: 75)*

The police report had come from a Consolidated Edison Company employee named R. V. Hardie, who had a pay stub on which he had inscribed the license plate number (Pace: 39). The reliability of Hardie was never established, and no corroboration other than the report itself was received by the police officers.

A license plate check determined that the car was registered to one Barbara Caggiano of 2517 Radcliff Avenue (Longo: 75).

The officers had returned to the station house about ten minutes after hearing the report, and following the aforesaid license plate check, they ultimately went to 2517 Radcliff Avenue (Pace: 29).

After the officers arrived at the address, they saw the car described in the radio alarm parked in front of the building (Pace: 6; Longo: 58).

The edifice itself was a three-story dwelling, comprising a number of apartments (Longo: 77).

The officers positioned their automobile about 50 to 60 yards from the portal of the building and kept the area under surveillance.

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* Numerals in parentheses refer to pages of the official court reporter's minutes of the suppression hearing, unless otherwise indicated.

They radioed for assistance, and after about 45 minutes of observation, which was about an hour after the receipt of the report, the officers observed a man, who was not the petitioner, stick his head out of the door of the building and look both ways down the street before exiting from the doorway (Longo: 59-60).

Later, petitioner, accompanied by the man who had viewed the street, together with a third male, exited from the building and the officers declared that they looked "Hispanic" (Pace: 11-12; Longo: 59-67).

Actually, the petitioner is Italian, as were the other individuals.

Petitioner walked past the station wagon and got into a taxicab. His two companions walked south on Radcliff Avenue toward the patrol car (Pace: 12). It is significant that these individuals went toward the patrol car, which was a plainly marked vehicle.

Meanwhile, the officers admittedly propelled their police vehicle across the street so as to prevent the taxicab from moving (Longo: 61; Pace: 42).

The officers alighted from their patrol car and Police Officer Longo accosted the appellant while Detective Pace approached the other two individuals (Pace: 14; Longo: 61).

Officer Pace approached the two individuals with his gun halfway out of the holster and demanded of them "Where are you going — where are you coming from?". One of these individuals, Alfred Peruso, replied "From down the block", and the officer asked Peruso for his name, which he provided (Pace: 15).

The other individual, later identified as Louis Giangetti, refused to give his name (Pace: 15).

Supposedly, another officer, a member of the Anti-Crime Unit, Police Officer Jantz, came up to Detective Pace and said "Watch the little guy. I locked him up with a gun before. Be careful." (Pace: 15).

Giangetti was then frisked and a loaded .32 caliber revolver and a blackjack were discovered in his rear pocket. Peruso had no weapons (Pace: 34).

Meanwhile Officer Longo went over to the rear passenger door of the taxicab in which petitioner was a passenger, with his gun held at his side, opened the door and ordered the petitioner to exit the vehicle. Petitioner looked at Longo, saying nothing, and then after a second demand, said "Let me get my coat", which request was refused. Petitioner complied with the order and exited the cab (Longo: 81; Pace: 36). Petitioner was escorted to the front of the taxi where members of a backup police unit kept him in custody while Longo returned to the back of the cab, got petitioner's coat, and allegedly then felt a hard object in the pocket, which turned out to be a loaded .357 magnum revolver wrapped in a dishcloth (Longo: 82; Pace: 35).

The officers stated that at this time petitioner was placed under arrest for possession of the gun, but for no other crime.

The court conducting the suppression hearing found that the police conduct was proper; that the gun was recovered without infringing petitioner's rights; and therefore the motion to suppress was denied.

To crystallize the issue on the search and seizure, petitioner pleaded guilty. Under New York law no intermediary appeal is permitted under these circumstances, except from the judgment of conviction. The plea of guilty, therefore, precipitated a judgment of conviction, which then enabled petitioner to appeal.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ACTIONS OF POLICE OFFICERS WHO BLOCKED A TAXICAB IN WHICH HE WAS RIDING AS A PASSENGER, COMPELLED HIM TO SUBMIT TO A SEARCH, AS A RESULT OF WHICH A LOADED GUN WAS FOUND IN A COAT INSIDE THE TAXICAB, PREDICATING THEIR ACTIONS SOLELY UPON AN ANONYMOUS POLICE RADIO REPORT THAT A POSSIBLE SHOOTING HAD OCCURRED ABOUT AN HOUR EARLIER. THE RADIO REPORT REFERRED TO FOUR "HISPANICS", BUT THE PETITIONER AND HIS COMPANIONS WERE "ITALIAN." NO ATTEMPT TO FLEE, OR ANY OTHER FURTIVE ACTIONS, WERE PERPETRATED BY PETITIONER OR THE OTHERS AND, ACCORDINGLY, THE ACTIONS OF THE AUTHORITIES VIOLATED HIS FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, AND THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Acting upon a police radio report that a "possible" shooting had occurred at a particular address in Bronx County, the officers, who ultimately arrested petitioner, learned a license plate number of a vehicle in which supposedly four male "Hispanics" had been riding, and who were described as the possible shooters.

The officers kept a surveillance on the address in front of which this empty vehicle was parked. About an hour after the report had been received, three male Italians, of which petitioner was one, left the multi-dwelling building before which the vehicle was parked. Two of the individuals, other than petitioner, walked toward the radio patrol car, and petitioner himself

entered a taxicab. Other than looking up and down the street, nothing furtive or suspicious was done by any of these individuals. The police blocked the path of the taxicab, drew their guns, and prevented the taxi from moving. Meanwhile, the other two individuals who had been in the company of the petitioner, were forceably seized and searched. In the pocket of one of these individuals a loaded .32 caliber gun was found.

The officers then forced petitioner to alight from the taxicab in which he was riding as a passenger, seized a coat which had been in the back seat, and found a .357 magnum pistol wrapped in a dish towel inside the pocket of the coat.

Predicated upon this, petitioner was arrested and charged with felonious possession of a weapon. No charges of shooting or any other violations of law were alleged.

It is not disputed that the officers possessed neither a search warrant nor an arrest warrant. Nor is it disputed that petitioner and his two companions were not "Hispanic", but, rather, were Italian.

It is elementary that all searches and seizures are presumptively invalid without a search warrant, unless they specifically fit within the purview of one of the limited exceptions to the search warrant requirement of the Fourth Amendment of the United States Constitution.

See United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93; *Jones v. United States,* 362 U.S. 257, 80 S. Ct. 725; *Bumper v. North Carolina,* 391 U.S. 543, 88 S. Ct. 1788; *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684; *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507; *Rakas v. Illinois,* 439 U.S. 128, 99 S. Ct. 421; *Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391; *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868; and *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022.

See also, Payton v. New York, ___ U.S. ___ (78-5420) and *Riddick v. New York,* ___ U.S. ___ (78-5421) (1980).

It must be borne in mind that petitioner had not been seen committing any crime whatsoever, nor was he acting in any sort of suspicious manner. The police were not in hot pursuit of known felons, nor was there an attempt to destroy evidence on the part of petitioner or his possible companions. Nothing was in plain view.

Thus, no exceptions to the requirements of a search warrant or an arrest warrant were present in the circumstances herein.

It cannot be denied that a passenger in a taxicab has a right to expect privacy, and certainly has standing to contest a search of his own person or clothes (*Rakas v. Illinois, supra*).

It is also clear that the *burden of proof that a search was proper rests with the police and not upon the petitioner (United States v. Jeffers, supra; McDonald v. United States,* 335 U.S. 451, 69 S. Ct. 191).

It can never be established that retrospectively an invalid search may be justified by what the search uncovers (*Bumper v. North Carolina,* 391 U.S. 543, 88 S. Ct. 1788).

Since the individuals who conducted the search were clearly police officers, we do not have any exceptions with respect to non-government action (*cf., Burdeau v. McDowell,* 256 U.S. 465, 41 S. Ct. 574; *Irvine v. California,* 347 U.S. 128, 74 S. Ct. 381.

It is also obvious from the facts herein that there was no emergency which warranted an exception to the search warrant requirement before a search could be conducted (*Mincey v. Arizona,* 437 U. S. 385, 98 S. Ct. 2408).

In *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, the facts, while not identical to those at bar, are certainly apt. Here, the defendant-petitioner was taken into custody for the purpose of permitting the police to conduct an illegal search and seizure. Even assuming, *arguendo*, that the police had a right to speak to the petitioner, they certainly had no right to conduct a search without a warrant.

Certainly there can be no logical claim that the petitioner "consented", under the totality of the circumstances herein. Such consent must be clearly voluntary, and submission to lawful authority is insufficient to justify this action. (*See Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266; *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367; *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041.)

Thus, we submit that the five basic exceptions to the requirement for a search warrant, namely (1) consent; (2) incident to a *lawful* arrest; (3) probable cause to search with exigent circumstances; (4) in hot pursuit; and (5) stop and frisk, are not present herein. Nor is there any plain view claim made.

The arrest herein was obviously not lawful because there was nothing that the officers saw that justified the arrest, and, in any event, the officers only had a police radio report of a possible shooting an hour earlier which they were investigating, involving four male "Hispanics", and they proceeded to arrest three male "Italians", who were lawfully walking in the street or entering a taxicab, in the case of petitioner. (*See Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329.)

Additionally, there was no vehicle or traffic violation which was claimed by the police, involving the taxicab, so they could not justify the search as an incident to such an arrest either (*Gustafson v. Florida*, 414 U.S. 260, 94 S. Ct. 488).

The case of *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, is therefore not in point either, since in the *Mimms* case, the

driver, not passenger, of a vehicle stopped for a traffic violation was ordered out of the car. That was not the case herein.

Again we emphasize, there is no evidence of "exigent" circumstances, since neither petitioner nor the other individuals supposedly involved were seen doing anything unlawful. It is certainly not a crime to look both ways before leaving a house, particularly in Bronx County in an area where one could take judicial notice there is a high incidence of crime (*Vale v. Louisiana,* 399 U.S. 30, 90 S. Ct. 1969; *United States v. Jeffers, supra; Chambers v. Maroney,* 399 U.S. 42, 90 S. Ct. 1975).

Assuming, *arguendo,* that police stopped the taxicab to check the license of the driver, or of the vehicle itself, this would be a random stop without reasonable suspicion for the purpose involved and consequently would violate *Delaware v. Prouse, supra.*

Moreover, there was no evidence that the petitioner was drunk, or that the officers were merely trying to protect the public, without being interested in seeking any evidence (*see Cady v. Dombrowsky,* 413 U.S. 433, 93 S. Ct. 2523).

A. The balancing test, to which the respondent adverted to in the lower court, is not applicable herein because the facts do not warrant its application, assuming it exists.

In the court below, the respondent apparently successfully argued that *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, justified the actions of the police officer as a so-called state "balancing test" of *sub-arrest* police activity. There was no "sub-arrest" since the petitioner was clearly arrested. Secondly, there was no probable cause to have warranted his arrest, under any circumstances.

Moreover, *Terry* specifically dealt with "probable cause" and declined to address "the constitutional propriety of an

investigative 'seizure' upon less than probable cause for the purpose of 'detention' and/or 'interrogation'." (*See Dunaway v. New York, supra.*)

It must be borne in mind that in *Terry* there was no forceable seizure of the individual until the actual frisk took place. In the case at bar, there was a clear forceable stopping and arrest of the petitioner before any search took place. Thus, it is completely distinguishable from *Terry (Terry v. Ohio, supra,* 392 U.S. at 19, footnote 6).

The police activity was unreasonable at its inception and no intervening, independent act by petitioner occurred which justified the activities of the police (*cf., People v. Sesslin,* 68 Cal. 2d 418; *People v. Teresinski,* Cal. Sup. Ct. 2/11/80, 26 Cr. L. 2531).

Accordingly, there was no justification for the police action herein and the motion to suppress should have been granted.

CONCLUSION

The petition for certiorari should be granted and upon granting, the conviction should be vacated and petitioner freed.

Respectfully submitted,

s/ IRVING ANOLIK
Attorney for Petitioner

APPENDIX

ORDER OF NEW YORK COURT OF APPEALS DENYING LEAVE

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

DOMINICK PILOTTI

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
June 17, 1980

s/ Jacob D. Fuchsberg
Associate Judge

Description of Order:

Order of the App. Div., First Dept., dated December 20, 1979 affirming a judgment of the Supreme Court, Bronx County rendered April 3, 1978.

ORDER OF NEW YORK SUPREME COURT, APPELLATE DIVISION — FIRST DEPARTMENT AFFIRMING JUDGMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1979

Present—Hon. Theodore R. Kupferman, Justice Presiding.
Harold Birns,
Arnold L. Fein,
Leonard H. Sandler, Justices.

The People of the State of New York,

Respondent,

-against-

Dominick Pilotto,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Ramos, J.), rendered on April 3, 1978, convicting defendant of criminal possession of a weapon in the third degree, and said appeal having been argued by Mr. Michael Young of counsel for the appellant, and by Mr. Steven Kartagener of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Order

ENTER:

s/ Joseph J. Lucchi
Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

ORDER AND OPINION OF NEW YORK SUPREME COURT — COUNTY OF BRONX FILED MARCH 14, 1978

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : TRIAL TERM PART 41

Ind. #891/77

PEOPLE OF THE STATE OF NEW YORK

-against-

DOMENICK PILOTTI,

Defendant.

The defendant herein was indicted and charged with the crime of criminal possession of a weapon in the third degree, Penal Law section 265.02. He has moved by his attorney for suppression of certain physical evidence, namely, a .357 Magnum Colt revolver, as being the fruit of an illegal search and seizure by law enforcement officers in violation of his Fourth Amendment rights under the Federal Constitution. A full and open evidentiary hearing was held in this matter on February 27, 1978, and concluded on February 28, 1978. After carefully considering the evidence adduced at the trial and the oral arguments advanced by both the defense and the prosecution and after a careful review of the testimony of the hearing, the Court makes the following Findings of Fact and Conclusions of Law.

On the morning of April 9, 1977, Detective Donald Pace of the 47th Precinct was on duty as the driver of a marked patrolcar and was on patrol with his partner Police Officer Frank Longo, who was the recording officer on that day. Detective Pace is a 21 year veteran of the Police Department and was promoted to the rank of Detective in 1973. Officer Longo is a veteran of the New York City Police Department of

some 3½ years. While patrolling their assigned area on that morning at approximately 9:20 A.M. they received a police radio bulletin which stated that there had been a "shooting" at the intersection of Boston Road and Mace Avenue in which the suspects were believed to be four male Hispanics, who were seen fleeing the scene of the incident in a green Pontiac stationwagon, for which a license plate number was given. At approximately 9:30 A.M. the officers returned to the precinct house to check on information involved in another matter and while there Officer Longo had the license plate number received by them concerning the shooting radioed to them checked out by the officer in charge of the computer system which is connected to the Central Data System concerning motor vehicle registration. The information check-out resulted in the verification that the license plate number in question indeed belonged to a green Pontiac stationwagon and that the vehicle was registered to a party residing at 2517 Radcliffe Avenue in the Bronx. Officer Longo returned to the patrolcar where he relayed this information to Detective Pace. Officer Longo then told his partner Detective Pace that the address in question was familiar to him and was close by. They proceeded to the location and arrived at 2517 Radcliffe Avenue, Bronx, within five minutes after having left the precinct house. There they found the green Pontiac stationwagon bearing the license plate number they had received through the radio bulletin parked directly in front of 2517 Radcliffe Avenue. They secreted their patrolcar as best they could about 50 to 60 yards away from the address, 2517 Radcliffe Avenue, and decided to wait to see if anyone fitting the general description of the suspects would exit from the premises 2517 Radcliffe Avenue.

While on the stakeout Detective Pace called the precinct house to alert them of their operation and of their intention to request for assistance in the event anyone fitting the general description exited from premises 2517 Radcliffe Avenue. Forty-

five minutes passed during which time they saw no one on the street. Then a person's head appeared out of the doorway of 2517 Radcliffe Avenue, and looked in both directions of the street. Immediately thereafter three persons exited the building which appeared to be a three story residence. From the vantage point of the two police officers the persons appeared to be three male Hispanics. The officers approached the men in their patrolcar. Detective Pace stopped the patrolcar and approached two of the men for the purpose of making a general inquiry. Officer Longo approached the defendant who at this time had entered and was seated in the rear of a private cab which had stopped by the building 2517 Radcliffe Avenue. Officer Longo asked the defendant to exit the cab. Officer Longo had drawn his revolver and was holding it pointed down at his side. The defendant seated in the cab looked toward Officer Longo, but made no immediate response to the officer's request. The officer repeated his request and the defendant then stated that he wished to retrieve his coat which was alongside of him in the rear seat. The defendant was informed by the officer not to touch anything and just to remove himself from the cab. Once the defendant was out of the cab the police officer retrieved the coat for the defendant but in doing so felt a hard object underneath the coat on the rear seat. Having removed the coat the officer found a hard object wrapped in a dish towel. The object was found to be a revolver, the subject matter of this motion.

Officer Longo handed the weapon to Detective Pace who examined it and found it to be loaded with live ammunition. The defendant was placed under arrest and charged with illegal possession of a loaded firearm.

At the outset the Court wishes to address defense counsel's assertion that the facts in this case fall under the purview of the law regarding investigative stops of persons inside automobiles

as set forth by the line of cases beginning with *People v. Ingle*, 36 N.Y. 2nd 413 and most recently restated in *People v. Sobotker*, ____ N.Y. 2nd ____ New York Law Journal 2/28/78. Counsel's reasoning for arguing in this form is that the defendant was seated in the rear of a private cab when first approached by Police Officer Longo. The Court is disinclined to view the facts in this case under the guise of this theory. Distinguished from the automobile stop cases, the facts in this case show no real nexus between the automobile itself and the basis for the initial confrontation of the defendant by the police officer. Here the vehicle had never moved before the defendant was asked to exit. The Court finds the law controlling in this case to be the common law right of inquiry of persons in public places (*People v. Rivera*, 14 N.Y. 2nd 441, cert. den. 379 US 978; CPL 140.50 "Stop and Frisk Law"). Furthermore, there is no rule that once a person enters a cab he becomes insulated from a reasonable stop by the police officers or that the police officers are held to a higher standard than reasonableness to justify the stop. (See *People v. De Bour*, 40 N.Y. 2nd 210 p. 224, 386 NYS 2nd 375, 352 N.E. 2nd p. 572.)

"The proper analysis in cases of this nature is to examine the predicate for the police action and then determine whether or not that predicate justified the extent of the officer's intrusion on the individual." *People v. Stewart, People v. Williams*, 41 N.Y. 2nd 66. An examination of the predicate for the police action in this case reveals the following.

The officers involved had received a radio communication concerning a "shooting", the place of occurrence, the number of individuals suspected, a general description of the suspects, a description of the vehicle used in flight from the scene and a license plate number of that vehicle. "A police officer may act on the strength of a communication from a fellow officer and assume its reliability." *People v. McLaurin*, 56 A.D. 2nd 80, 84

Order and Opinion

Dis. Op. of Justice Nunez, ____ N.Y. 2nd ____, Rvg. on Dis. Op. of Justice Nunez decided 2/14/78.

Much has been made in recent decisions, (*People v. Lypka,* 36 N.Y. 2nd 210; *People v. Green,* 35 N.Y. 2nd 193,) of the question of whether a police officer can rely on information supplied by a police radio bulletin, the source of which is anonymous to him, without some independent verification by the police officer of the information supplied, *People v. Johnson,* 30 N.Y. 2nd 929. Although the Court of Appeals recent holding in *People v. McLaurin,* supra, indicates a change in the law which would allow reliance upon such information, especially where weapons are involved, the facts in this case disclose that the reliability of the information was tested by the police officers when they determined that the license plate number supplied did indeed match up with the description of the vehicle given.

The observation in both directions of the street before exiting the building with two other individuals, one being the defendant, constituted a further element of the predicate, and combined with the other factors here involved, was such furtive conduct as to give probable cause for inquiry and detention, *People v. Ludwig,* 38 N.Y. 2nd 970.

The final factor which initiated the police action was that the three men they observed exit the address 2517 Radcliffe Avenue, which address was the exact address of the registered owner of a green Pontiac stationwagon, fit, in the minds of both police officers, the general description of the suspects. Admittedly, a general description of four male Hispanics alone would not give rise to justification for the stop. However, combined with the information that led them to that location and the furtive conduct observed, i.e., one person's head appearing out of the doorway and looking in both directions of the street, would amplify the basis for the reasonable suspicion

to stop required by CPL 140.50 and defined in *People v. Cantor*, 36 N.Y. 2nd 106 as that quantum of knowledge which under the circumstances then present would prompt an ordinarily prudent and cautious man to believe that criminal activity is at hand or that the persons detained have committed a crime.

Finally, the police were confronted by a situation in which they were outnumbered and in which they had knowledge that weapons could be involved and had been used in an incident occurring a short time previous to the confrontation. Thus the police were justified in proceeding with caution in view of the fact that the confrontation could involve a real degree of danger to their personal safety.

In examining the extent of the police intrusion we find Police Officer Longo approached the defendant for the purpose of making inquiry. Nowhere is it supported by the record that his intentions went beyond this point. The Court also finds that the police officer did indeed have his gun drawn and held down by his side. Under the circumstances the request by the officer to the defendant to remove himself from the cab and not touch anything was a minimal intrusion on the individual, and it was reasonable for the police officer to question the defendant outside the cab where he could have an unobstructed view of the defendant in doing so, rather than to question the defendant while seated in the cab which would preclude a full view of the defendant. Having his gun drawn down at his side was a necessary and prudent action by Police Officer Longo in view of the circumstances. The retrieving of the coat which led to the discovery and seizure of the gun did not constitute a search under these facts but a response by the police officer to the concern expressed by the defendant regarding his coat being left in the cab.

Thus it is clear that the predicate for the police action was ample justification for the minimal intrusion of the defendant in

this case. Clearly once the gun was discovered the police had sufficient cause to arrest the defendant. Accordingly, for the reasons asserted above the Court finds that there was no unlawful search or seizure conducted by the police officers in this case to taint the evidence sought to be introduced which would require suppression of that evidence. The motion to suppress is denied and the Clerk of the Court is directed to serve copies of the Court's decision on counsel for the defendant and the Officer of the District Attorney. This constitutes the order and opinion of the Court.

Dated: March 10, 1978

s/ Manuel Ramos
MANUEL RAMOS
J.S.C.

FILED
AUG 11 1980
MICHAEL RODAK, JR., CL

No. 80-46

Supreme Court of the United States

October Term, 1979

DOMINIC PILOTTI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the detaining of a cab in which petitioner sat and the seizure of a pistol under petitioner's coat which rested on the seat next to him constituted an illegal search and seizure.

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DOMINIC PILOTTI,

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THE PEOPLE OF THE STATE OF NEW YORK,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review the order of the New York Supreme Court, Appellate Division, First Department, entered December 20, 1980 which affirmed an April 3, 1978 judgment of the Supreme Court of the State of New York, Bronx County, convicting petitioner of the crime of Criminal Possession of a Weapon in the Third Degree, and sentencing him to a term of from two-and-one-half to five years imprisonment.

Petitioner is presently incarcerated pursuant to the above sentence, and another indeterminate sentence of from 11 to 22 years imprisonment imposed on an unrelated homicide conviction.

Statement of the Case

After a New York State trial court judge denied his motion to suppress a gun discovered in his possession, petitioner pleaded guilty to Criminal Possession of a Weapon in the Third Degree. This conviction was affirmed by the New York State Supreme Court, Appellate Division, and leave to appeal to the New York State Court of Appeals was denied. The pertinent facts of the instant case are as follows:

On April 9, 1977, at about 9:30 a.m., Detective **Douglas Pace** and his partner, Police Officer **Frank Longo**, were on routine patrol in their radio car in Bronx County when they received information concerning a shooting (Pace: 56; Longo: 56). The report stated that there was a shooting at "Boston and Mace," and that the people who had done the shooting were four male Hispanics who fled the scene in a green Pontiac stationwagon bearing New York license plates 232XDP (Pace: 23; Longo: 75). This report had come from a Con Edison employee named R. V. Hardie. This was substantiated by the introduction into evidence of Mr. Hardie's pay stub, on which Mr. Hardie had written the license plate number (Pace: 39).* The officers returned to their stationhouse about 10 minutes after hearing the report, where they ran a license plate check and determined that the car was registered to Barbara Caggiano of 2517 Radcliff Avenue (Longo: 75). This plate check took about one or two minutes, after which the officers made the five-minute ride to 2517 Radcliff Avenue (Place: 29).

* Although it is not clear on the record, it is apparent that Mr. Hardie witnessed the shooting and turned over his pay stub either to officers on the scene or at the stationhouse.

When the officers arrived at the address they saw the car described in the radio alarm, bearing the same license plate, parked in front (Peace: 6; Longo: 58). The building at 2517 Radcliff Avenue was a three-story dwelling with a number of apartments (Longo: 77). The officers positioned their car about 55 or 60 yards from the front door of the house and kept the area under surveillance, as surreptitiously as possible, from their marked police car (Pace: 6). At this time they radioed for assistance from plainclothes officers (Peace: 6; Longo: 59). After 45 minutes of observation, the officers saw a man, not petitioner, stick his head out of the door. The man looked both ways down the street before exiting from the doorway (Longo: 59-60). Then petitioner, accompanied by the man who checked the street, and a third man, emerged from the house. From their observation post 60 yards away, both officers believed that the three men were Hispanic (Pace: 11-12; Longo: 59-67).

As he left the house, petitioner walked past the station-wagon and got into a cab. Petitioner's two companions walked south on Radcliff Avenue toward the patrol car (Pace: 12). Meanwhile, the officers pulled their car across Radcliff Avenue which prevented the cab from moving from the spot where appellant got in (Longo: 61; Pace: 42). The officers then alighted from their patrol car; Police Officer Longo approached petitioner and Detective Pace approached the other two men (Pace: 14; Longo: 61).

Pace approached the men with his gun halfway out of his holster and inquired, "Where are you going—where are you coming from?" One of the men, later identified as

Alfred Peruso, replied "From down the block." The other man, later identified as Louis Giangetti, would not answer when asked his name (Pace: 15). At that moment a member of the Anti-Crime Unit, Police Officer Jantz, came up to Detective Pace and said, "Watch the little guy. I locked him up with a gun before. Be careful" (Pace: 15). Pace then holstered his gun, frisked Giangetti, and found a loaded .32 caliber revolver and a black jack in his rear pocket. Peruso had no weapons on him (Pace: 34).

After a quick check to see if his partner needed assistance, Officer Longo walked over to the cab, which was standing about five yards in front of the radio car (Longo: 81). Officer Longo went over to the rear passenger door of the cab, with his gun held at his side, opened the door where appellant sat with his white fur coat on the seat next to him and asked him "Will you please exit the vehicle?" Petitioner just looked at Longo and said nothing. Officer Longo repeated his request a second time and petitioner said "Let me get my coat." Longo replied, "Don't touch anything, just let me see your hands and just step out." Petitioner complied with this request and got out of the cab (Longo: 81; Pace: 36).

Officer Longo escorted petitioner to the front of the cab where they were met by members of the back-up unit (Longo: 82). Then Officer Longo returned to the cab for the purpose of picking up petitioner's coat (Longo: 125-126). As he did so he felt a hard object under the coat. When he lifted the coat he found, on the seat, a loaded .357 Magnum revolver wrapped in a dishcloth (Longo: 82; Pace: 35).

Petitioner was then placed under arrest for possession of the gun.

ARGUMENT

POINT

No important issue of federal law is involved.

The instant case presents a search and seizure question which is neither novel nor important enough to merit this Court's review.

Petitioner calls upon this Court to review an affirmed factual determination of a state trial court. However, this Court has stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1924). *See also Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949). In fact, commentators have noted:

> Apart from cases dealing with federal and state statutes, review is often sought of decisions which deal with various other matters of constitutional law, such as the application of the full faith and credit clause and the search and seizure provision of the Fourth Amendment to particular situations. But the presence of such issues, without more, is not enough to warrant review by certiorari. The issues must be novel, unsettled or important, a conflict of decisions must exist, or the law on the matter must be such as to warrant further consideration. *Supreme Court Practice,* Stern and Gressman, 1969 at page 169.

This comment is particularly apt in the instant case where the issue concerns the sufficiency of the predicate for

police action. This Court has specifically held on many occasions that striking a balance between police behavior and Fourth Amendment rights must be developed ". . . in the concrete factual circumstances of individual cases." *Terry* v. *Ohio,* 392 U.S. 1, 31 (1968); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967). In the case at bar we have a fact pattern which can be, and has been below, decided on the basis of constitutional principles set forth in cases decided by this Court. This case does not present any novel theory. Nor does it present any opportunity for this Court to settle an unsettled area of the law. In short, this is a matter which should be left to the court below.

Further, this case was correctly decided. In the instant case, the officer's actions were reasonable and, therefore, the seizure of this weapon in no manner infringed on petitioner's Fourth Amendment rights. In this case, the combination of circumstances clearly warranted the restrained, limited intrusion by the investigating police officers, which resulted in the discovery of petitioner's weapon.

In evaluating police citizen encounters one must:

> . . . consider first whether or not the police action was justified at its inception and secondly whether or not that action was reasonably related in scope to the circumstances which rendered its initiation permissible.

People v. *DeBour,* 40 N.Y. 210 (1975).

In other words one must:

> examine the predicate for the police action and then determine whether or not that predicate justified the extent of the official intrusion on the individual. Thus, the predicate established defines the scope of permissible police conduct.

People v. *Stewart,* 41 N.Y.2d 65, 66 (1976).

The above standard articulated by the New York State Court of Appeals and made part of New York's Criminal Procedure Code, Section 140.50, was utilized by the trial court. These decisions of New York's highest court were specifically based on the "stop and frisk" decisions of this Court. *Terry* v. *Ohio, supra,* and *Sibron* v. *New York,* 392 U.S. 40 (1968). Thus, one must conclude that the trial court applied the correct standard in weighing the facts at hand.

The trial judge found that the police acted on the basis of their "common law right to inquire." An argument could very well be posited that because petitoner had not been physically grabbed, that no gun had been pointed at him, nor, in fact, was he ever frisked, that this was merely a common law inquiry rather than a "forcible stop." *People* v. *Santiago,* 64 A.D.2d 355, 361 (1st Dept. 1978), *cf. People* v. *Cantor,* 36 N.Y.2d 106 (1975) (where the defendant was encircled by the officers with pointed pistols after they stopped his moving vehicle). However, the instant case does not turn on this issue because even measured against the somewhat higher "reasonable suspicion" standard, urged as controlling by petitioner, the police conduct surely passes constitutional muster.

As noted above, it is quite significant that this is not a "frisk" case. It is a far less intrusive situation. The officers never placed their hands on petitioner's body in any kind of pat down or limited body search. Hence, in evaluating the police conduct in the instant case, this Court need only be concerned with whether the officers were justified in preventing the cab from leaving the scene and requiring petitioner to get out for questioning.

There were several objective, articulable factors which justified this limited seizure of petitioner: (1) the officers had good cause to believe that there had been a serious crime, a shooting, committed in their precinct. *Terry* v. *Ohio, supra.* The information had been furnished by an identifiable person who had been questioned at the scene. The broadcast had come to the officers via their police radio. Thus, rather than acting on the basis of an anonymous tip, they possessed information furnished by a bystander who was available for further questioning and had gotten his information first-hand. *Adams* v. *Williams,* 407 U.S. 143 (1972). Further, the officers were entirely justified in giving credence to a broadcast received over official police channels. *See People* v. *Lypka,* 36 N.Y.2d 210 (1975).

(2) The officers were able to get to 2517 Radcliff Avenue within 20 minutes after the shooting. Once there, they immediately noticed that the vehicle which was the target of their search was parked in front of the three-story building. In fact, if this had been a single unit dwelling the officers would have had probable cause to arrest the occupants. *Hollins* v. *United States,* 338 F.2d 227 (9th Cir. 1964).

(3) Before exiting the house one of the suspects looked up and down the street. This was certainly not a wholly innocent act; rather, it was, from the officer's viewpoint, quite consistent with the conduct of a person who had committed a crime an hour earlier and was checking to see if the "coast was clear." *See People* v. *Ludwig,* 38 N.Y.2d 970 (1976); *People* v. *Samuels,* 68 A.D.2d 663 (1st Dept. 1979).

(4) The men who exited the house fit the limited description provided in the broadcast. *See People* v. *Chest-*

nut, 69 A.D.2d 41, 46 (1st Dept. 1979). From their vantage point, 50 to 60 yards from the building, the three swarthy men looked Hispanic. Certainly, this was the type of conclusion which could have been drawn by the person who saw the car full of men go by during that shooting.

(5) The need to stop petitioner was immediate because he had entered a cab and was apparently soon to exit the scene. They were faced with a situation where failure to take immediate action certainly would have resulted in the escape of all three people.

(6) Further, until the back-up unit arrived, the officers were outnumbered by a group of men whom they believed to be armed and whom they believed to have committed a serious crime only an hour earlier.

Thus, it is quite clear that detaining petitioner and his cohorts was entirely proper. The officer's additional request that petitioner exit the cab is of no real significance because it is well established that this request is at most a minimal intrusion and constitutes reasonable police conduct. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *People* v. *Diaz*, 41 N.Y.2d 876 (1977). Officer Longo, dealing with a man he suspected possessed a gun, quite prudently and properly requested that appellant exit the cab before speaking with him further.

Finally, petitioner argues that Officer Longo's retrieval of petitioner's coat was unreasonable. This argument makes no sense because it is clear that Longo did not search the coat or the cab; he merely lifted the coat off the seat and uncovered a metal object wrapped in a dishcloth which turned out to be a revolver. Further, the officer tes-

tified that, although he suspected that there was contraband in the coat, he was picking up the coat to recover petitioner's property rather than leave it in the cab which was apparently free to go once petitioner had exited (Longo: 125). The coat was obviously an object of some value and one which petitioner expressed a desire to keep in his possiession (Pace: 36).

We submit that it is clear that the police conduct under these circumstances was eminently justified and, therefore, the fruits of their endeavor was properly held admissible. Further, even if this Court decides that they might have weighed the facts in a different manner, this, of itself, does not in any way mandate review by this Court. *Graver Mfg. Co.* v. *Linde Co., supra* at 275 (1948).

In light of the foregoing, we submit that this Court should decline to review the instant case.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August, 1980